Masterskill (M) Sdn Bhd v Kemacahaya Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S22–96 OF 2007
LAU BEE LAN J
20 APRIL 2012

Land Law — Restraint on dealings — Private caveat — Removal of caveat, application for — Whether Form 19B not in compliance with s 323 of the National Land Code — Whether Form 19B not properly dated — Whether attestation clause absent — Whether statutory declaration not in compliance with s 2 of the Statutory Declaration Act 1960 — Court to place more weight in substance than form — Whether there was manifest or fundamental error — Whether balance of convenience in favour of caveat remaining — National Land Code ss 211 & 323

The second defendant applied for a removal of a private caveat lodged by the plaintiff over a piece of land. The second defendant claimed that the caveat in Form 19B (exh KP3) did not comply with the provisions of s 323 of the National Land Code ('NLC') due to the following reasons: (a) that the Form 19B was undated but with the year 2008 at the time it was filed; (b) that the attestation clause in accordance with the requirement under s 211 of the NLC was absent; and (c) that the statutory declaration made pursuant to s 323 of the NLC did not comply with the provisions of s 2 of the Statutory Declaration Act 1960 ('SDA'). The plaintiff contended that s 211 of the NLC was not applicable and that it was not required to comply with the requirement of attestation under s 211 because the plaintiff was a company and not a 'natural person'. The plaintiff claimed that only the execution of instruments of dealing by a natural person requires attestation in accordance with the provisions of s 211 of the NLC.

Held, dismissing the second defendant's application with costs fixed at RM5,000:

(1) On the issue of the propriety of Form 19B, s 211 of the NLC was applicable based on a reading of s 323(2) of the NLC read together with s 211(2) of the same (see para 5).

(2) Although in exh KP3 the attestation clause was not complied with, the person who signed the said caveat on behalf of the plaintiff never disputed there was a forgery and neither did the defendants. Hence the purpose of s 211 had been met and there was no breach of s 211 of the NLC. The authenticity of the signature of the plaintiff's representative who executed Form 19B for the purpose of applying for a private caveat

to be entered against the said land was never an issue (see para 9); *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [2002] 3 MLJ 572 referred.

(3) There was a slight difference between the impugned statutory declaration and the prescribed form of declaration prescribed under s 2 of the SDA However, there was substantial compliance with the prescribed form of declaration under s 2 of the SDA. The second defendant was neither prejudiced nor misled. The court should place more weight in the substance than the form (see paras 13 & 15); *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681 referred.

(4) The court should adopt a liberal and progressive approach in the interpretation of caveat forms. There was no manifest or fundamental error in the present case (see paras 16 & 18).

(5) There were two sale and purchase agreements over the same properties, two suits concerning the ownership of the same properties and two conflicting judgments regarding the ownership of the same properties. Hence, the plaintiff's claim disclosed a serious question to be tried ie the claim was neither frivolous nor vexatious. The balance of convenience lay in favour of the caveat remaining on the register pending the disposal of the appeals in the two suits (see paras 25–26).

[Bahasa Malaysia summary

Defendan kedua telah memohon untuk pembatalan kaveat persendirian yang dimasukkan oleh plaintif ke atas sebidang tanah. Defendan kedua telah mendakwa bahawa kaveat dalam Borang 19B (eksh KP3) tidak mematuhi peruntukan s 323 Kanun Tanah Negara ('KTN') akibat sebab-sebab berikut: (a) bahawa Borang 19B tidak bertarikh tetapi hanya bertahunkan 2008 pada masa ia difailkan; (b) bahawa tiada fasal pengesahan menurut keperluan di bawah s 211 KTN; dan (c) bahawa deklarasi statutori yang dibuat menurut s 323 KTN tidak mematuhi peruntukan s 2 Akta Akuan Berkanun 1960 ('AAB'). Plaintif berhujah bahawa s 211 KTN tidak terpakai dan bahawa ia tidak perlu mematuhi keperluan pengesahan di bawah s 211 kerana plaintif adalah sebuah syarikat dan bukan 'orang biasa'. Plaintif mendakwa bahawa hanya pelaksanaan surat cara pengurusan oleh orang biasa yang memerlukan pengesahan menurut peruntukan s 211 KTN.

Diputuskan, menolak permohonan defendan kedua dengan kos ditetapkan pada RM5,000:

(1) Berhubung isu hak milik Borang 19B, s 211 KTN adalah terpakai berdasarkan pembacaan s 323(2) KTN dibaca bersama s 211(2) yang sama (lihat perenggan 5).

(2) Walaupun dalam eksh KP3 fasal pengesahan tidak dipatuhi, orang yang menandatangani kaveat bagi pihak plaintif tidak mempertikaikan

terdapat pemalsuan dan begitu juga defendan-defendan. Justeru tujuan s 211 telah dipenuhi dan tiada pelanggaran 211 KTN. Kesahihan tandatangan wakil plaintif yang menyempurnakan Borang 19B bagi tujuan memohon kaveat persendirian dimasuki ke atas tanah tersebut tidak pernah menjadi isu (lihat perenggan 9); *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [2002] 3 MLJ 572 dirujuk.

(3) Terdapat sedikit perbezaan antara akuan berkanun yang dipersoalkan dan borang akuan yang ditetapkan di bawah s 2 AAB. Walau bagaimanapun, terdapat juga pematuhan dengan borang akuan yang ditetapkan di bawah s 2 AAB. Defendan kedua tidak diprejudiskan atau dikelirukan. Mahkamah patut meletakkan beban lebih kepada isi kandungan daripada borang tersebut (lihat perenggan 13 & 15); *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681 dirujuk.

(4) Mahkamah patut menggunakan pendekatan yang liberal dan progresif dalam pentafsiran borang-borang kaveat. Tiada kesilapan besar atau penting dalam kes ini (lihat perenggan 16 & 18).

(5) Terdapat dua perjanjian jual beli atas hartanah-hartanah yang sama, dua guaman berkaitan pemilikan hartanah-hartanah yang sama itu. Justeru tuntutan plaintif-plaintif menunjukkan persoalan serius yang perlu dibicarakan, iaitu tuntutan itu tidak remeh ataupun menyusahkan. Imbangan kesesuaian lebih kepada kaveat itu dikekalkan dalam daftarai sementara penyelesaian rayuan-rayuan dalam dua guaman itu (lihat perenggan 25–26).]

Notes

For cases on private caveat, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4522–4528.

Cases referred to

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Mok Yong Kong & Anor v Mok Yong Chuan [2002] 2 MLJ 718, CA (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782, CA (refd)

Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd [1999] 4 MLJ 585; [1998] 3 CLJ Supp 403, HC (refd)

Teh Kim Chooi v Regina [1955] 1 MLJ 37 (distd)

Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd [2011] 4 MLJ 681; [2011] 6 CLJ 137, FC (folld)

Velumailum v PP [1947] 1 MLJ 152 (distd)

Wee Huay Fong v Pentadbir Tanah, Klang & Anor [2002] 3 MLJ 572; [2002] 6 CLJ 512, HC (refd)

Wong Fook Seng v Mrs Fredericks nee Khoo Swee Choo [1998] 6 MLJ 321, HC (refd)
Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 2 MLJ 104 (refd)

Legislation referred to

National Land Code ss 211, 211(2), 323, 323(1), (2), Forms 13B, 19B
Statutory Declaration Act 1960 s 2, Schedule

R Jayasingam (Suren Rajah with him) (BH Lawrence & Co) for the plaintiff.
T Gunaseelan (M Rajkumar and Nora Hayati Ismayatim with him) (Law, Raj, Teh & Partners) for the second defendant.

Lau Bee Lan J:

[1] Vide a summons in chambers' application dated 8 November 2011 (encl 117), the second defendant, K Pasupathy, has applied for a removal of a caveat dated 3 June 2010 (exh KP3, corrective affidavit and affidavit in reply of second defendant (encl 121)) lodged by the plaintiff, Masterskill (M) Sdn Bhd, vide presentation No 3354/2010 over the land held under HS(M) 4900 PT 5707 Mukim Hulu Langat Negeri Selangor be removed forthwith with damages to be assessed with costs.

[2] The court has considered the second defendant's outline submission dated 12 December 2011 (encl 144), the plaintiff's submissions dated 26 January 2012 (encl 145), the plaintiff's submissions in reply dated 16 February 2012 (encl 146), the accompanying bundle of authorities and the oral submissions. The court dismissed the second defendant's application (encl 117) with costs to the plaintiff fixed at RM5,000 for the reasons as set out below.

FINDINGS OF THE COURT

[3] Basically the second defendant approached the application on the basis that the caveat in Form 19B (exh KP3) does not comply with the provisions of the National Land Code ('NLC') ie s 323 of the NLC. The grounds are — (i) that Form19B was undated but with the year 2008 at the time it was filed; (ii) the attestation clause in accordance with the requirement under s 211 of the NLC is absent; and (iii) the statutory declaration made pursuant to s 323 of the NLC does not comply with s 2 of the Statutory Declaration Act 1960.

[4] The plaintiff contends s 211 of the NLC is not applicable and it is not required to comply with the requirement of attestation under s 211 because the plaintiff is a company and not a 'natural person' and that only the execution of

instruments of dealing by a natural person require attestation in accordance with the provisions of s 211 of the NLC. In support of this proposition, the case of *Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 4 MLJ 585; [1998] 3 CLJ Supp 403 (HC) at p 404 was cited.

[5] With respect I cannot agree. On the issue of the propriety of Form 19B, I agree with the second defendant's submission that s 211 of the NLC is applicable based on a reading of s 323(2) of the NLC read together with s 211(2) of the same.

[6] Section 323 of the NLC (material part) reads:

> (1) …
>
> (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in *Form 19B and such application shall be attested in accordance with the provisions of section 211* and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.
>
> (3) Any application under this section shall be accompanied by -
>
> (a) the prescribed fee;
>
> (b) the grounds giving rise to the claim thereto, *verified by a statutory declaration by the applicant* or his advocate and solicitor; and
>
> (c) if relating to a part of the land, a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof, a description, which is sufficient for identification.
>
> (Emphasis added.)

[7] Section 211 (material parts) states:

> (1) Every execution by a natural person of any instrument effecting any dealing under this Act shall be attested in accordance with the following provisions of this section *by one of the officers or other persons specified in that behalf in the Fifth Schedule.*
>
> Provided that this requirement shall not apply to the execution of any such instrument by -
>
> …
>
> (2) The attestation clause to be used *in any case shall be that shown in Form 13B;* and the position thereof in the instrument shall be immediately after the execution to which it relates.
>
> (3) The officer or other person attesting any execution pursuant to this section shall sign the attestation clause and, if he has a seal of office, authenticate his signature with that seal.

(Emphasis added.)

[8] The form of attestation clause provided in Form 13B is as follows:

Form 13B

(Section 211)

FORM OF ATTESTATION CLAUSE

I,……

……

[Here insert full name and qualification of person attesting.]

hereby testify that the above *signature/thumb print was *written/affixed in my presence this…… day of……., 19……., and is the true *signature/thumb print of -

……

[Here insert name of person attesting.]

who has acknowledged to me

(i) that he is of full age;

(ii) that he is a citizen of Malaysia;

(iii) that he has voluntarily executed this instrument; and

(iv) that he understands the contents and effect thereof.

As witness my hand this…….. day of……., 20……

……..

Signature

[9] Although in exh KP3 the attestation clause was not complied with, I am of the view that in this instance the person who signed the said caveat on behalf of the plaintiff never disputed there was a forgery and neither did the defendants. Hence the purpose of s 211 has been met and there is no breach of s 211 of the NLC. I am incline to agree with the plaintiff that the issue of the authenticity of the signature of the plaintiffs representative who executed Form 19B for the purpose of applying for a private caveat to be entered against the said land was never an issue.

[10] I draw support for this proposition in the case of *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [2002] 3 MLJ 572; [2002] 6 CLJ 512, where the High Court held that s 211 of the NLC seeks to prevent forgery by ensuring the attesting witness certifies that the person executing the charge is in fact the

chargor. If the chargor does not dispute the fact that he/she is the person who executed the charge, the mischief has been addressed.

[11] The plaintiff contends that the statutory declaration (attached to Form 19B — exh KP3) ('the impugned Statutory Declaration') was not sworn by the applicant in compliance with s 2 of the Statutory Declaration Act 1960 and accordingly the grounds giving rise to the claim in Form 19B have not been verified by any statutory declaration by the applicant as required under s 323 of the NLC.

[12] For ease of reference the form of declaration (in both versions) prescribed under the s 2 of the Statutory Declaration Act is as follows:

SCHEDULE

[Section 2]

In Malay

BORANG AKUAN

Saya,……
dengan sesungguh dan sebenarnya mengakui bahawa……dan
dan saya membuat akuan ini dengan kepercayaan bahawa akuan ini adalah benar, serta menurut kuasa peruntukan Akta Akuan Berkanun 1960.

Diperbuat dan dengan sebenar-benarnya diakui oleh

yang tersebut namanya di atas…….

di……

di
Negeri……

pada……..
haribulan……

……..,19……

Di hadapan saya,

……

(Tandatangan Hakim
Mahkamah Sesyen, Majistret
atau Pesuruhjaya Sumpah)

Statutory Declarations

In English

FORM OF DECLARATION

I,……do solemnly and sincerely declare that…… …… and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared by the abovenamed

……

at……

in the State of……

this……..day of……..,19…….

Before me,

……..

(Signature of Sessions Court Judge,
Majistrate or Commissioner
for Oaths)

[13] When a comparison of the impugned statutory declaration is made with the prescribed form of declaration prescribed under the s 2 of the Statutory Declaration Act, I observe there is a slight difference in that:

Prescribed Form of Declaration

(a) Saya … dengan sesungguh dan sebenarnya mengakui bahawa …

Impugned Statutory Declaration

(a) Saya … dengan sesungguhnya dan sebenarnya mengaku bahawa …;

Prescribed Form of Declaration

(b) dan saya membuat akuan ini dengan kepercayaan bahawa akuan ini adalah benar, serta menurut kuasa peruntukan Akta Akuan Berkanun 1960

Impugned Statutory Declaration

(b) Saya membuat Akuan ini dengan penuh kepercayaan bahawa apa-apa yang tersebut di atas adalah benar serta menurut kuasa peruntukan Akta Akuan Berkanun, 1960

Prescribed Form of Declaration

(c) Diperbuat dan dengan sebenar-benarnya diakui oleh yang tersebut namanya di atas …

Impugned Statutory Declaration

(c) Diperbuat oleh yang tersebut namanya di atas …

[14] The second defendant contends the caveat (exh KP3) is defective and relying on the case of *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104 at p 107-

> Thus, if a defective caveat is lodged it can be treated as waste paper: per Pring J in *Palmer v Wiley* (1906) 23 MN (NSW) 90, 91.

[15] On the other hand I am more incline to agree with the plaintiff that the approach to be adopted is as taken in *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681; [2011] 6 CLJ 137. The sole question of law before the Federal Court concerned the respondent's contention that the caveat entered by the appellant was defective (i) in form in that the appellant used an outdated Form 19B which has been superseded by the current form under Act A1104/01 and did not state whether the caveat was to bind a part or an undivided share in the land and a description thereof; and (i) substance because the appellant failed to delete either of the descriptive word found in Form 19B ie 'tanah sendiri/kepentingan', which omission resulted in uncertainty in the nature of the caveat, whether one binding the land or just a particular interest. The Federal Court's response under the heading titled 'Analysis' per at pp 146–149 paras 15–26 in determining the question of law is instructive.

[16] Guided by the principles propounded in *Upmarket Development Sdn Bhd*, upon a comparison of the aforesaid 'differences' (para 9 above), I find there has been a substantial compliance with the prescribed form of declaration under s 2 of the Statutory Declaration Act, and the second defendant has neither been prejudiced nor misled as 'the Court should place more weight in the substance than the form' and to reiterate the impugned statutory declaration is substantially in conformity with the prescribed form of declaration; further the court should adopt a liberal and progressive approach in the interpretation of caveat forms and 'Case laws (from New Zealand and Australia under which the Torrens System also operates) have held that substantial compliance with the relevant form is sufficient and that 'a slavish adherence to prescribed form was not required'.

[17] The plaintiff relies on the case of *Wong Fook Seng v Mrs Fredericks nee Khoo Swee Choo* [1998] 6 MLJ 321 (HC) in support of his contention that the caveat is defective for failure to comply with s 323 of the NLC and on this ground alone the caveat should be removed. However it is to be noted in the aforesaid case despite the view that there must be strict compliance in terms of Form 19B, His Lordship Low Hop Bing (now JCA), inter alia, held at p 325B:

> … There can be no compromise in ensuring that the particulars contained in the form are both correct and accurate. Where, after a proper perusal of the form, a manifest fundamental error is found, the error may render the entry of a caveat a nullity.

[18] It is the finding of this court in this instant case, for the reasons explained, I am of the opinion there is no manifest fundamental error. A

[19] The second defendant relies on the authorities of *Teh Kim Chooi v Regina* [1955] 1 MLJ 37 at p 38 and *Velumailum v Public Prosecutor* [1947] 1 MLJ 152 at p 153. The former case followed the latter case and the court held: B

> Held: (1) because of the omission of the words 'Declared at, etc' from the declaration in this case the declaration was not a declaration within the meaning of s 199 of the Penal Code; (2) it is not sufficient for a declarant simply to sign the declaration; he should actually declare it before the Justice of the Peace or Commissioner for Oaths before whom it is to be declared. C

[20] As correctly highlighted by the plaintiff, both these cases can be distinguished in that on the facts of the case, there was omission of the words 'Declared at this … day of … before me'. Whereas in this instant case there was no such omission of the said words. It was merely a difference in the manner I have demonstrated at para 9 above. D

[21] In *Mok Yong Kong & Anor v Mok Yong Chuan* [2002] 2 MLJ 718 (as case cited by the second defendant) at p 722 D–E, with respect to the question of the test to be applied when determining an application for the removal of the caveat, His Lordship Gopal Sri Ram JCA opined that there are three stages as set out in the case of *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 at p 788: E F

> First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. G

(See *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681; [2011] 6 CLJ 137 at pp 692–693 at paras 34–36 (FC) at pp 148–149 paras 23–25). H

[22] The facts of this case are important. On 13 October 2006, the plaintiff entered into a sale and purchase agreement ('the first SPA') with Syarikat Kemacahaya Sdn Bhd (SKSB — the fifth defendant) as the land owner and Kemacahaya Development Sdn Bhd (KDSB — the first defendant) as the developer to purchase six units of shop-offices ('the properties') (p 38 of exh SA1 *afidavit balasan* by Dato' Sumathi (encl 120)). SKSB and KDSB purported to terminate the first SPA in November 2006. On 2 December I

2006, the second defendant entered into a sale and purchase agreement ('the second SPA') with SKSB and KDSB to purchase the same properties (p 61 of exh SA1 *afidavit balasan* by Dato' Sumathi (encl 120)).

[23] The plaintiff has shown it has a caveatable interest in that there is a consent judgment dated 14 July 2009 in S6–22–96 of 2007 ('first suit') whereby the plaintiff has commenced the same against the second, first and fifth defendants and two other parties claiming, inter alia, a declaration that the 'first SPA' is still in force for specific performance of the first SPA. This is pending appeal in the Court of Appeal. The second defendant has tried and failed to set aside the said order. The fifth defendant, as registered proprietor has confirmed the plaintiff has paid the full purchase price.

[24] On the other hand, on 12 May 2008 the second defendant commenced a suit, S6–22–589 of 2008, against the SKSB and KDSB claiming for, inter alia, a declaration that the second defendant is the beneficial owner of the properties ('the second suit'). In the second suit, the second defendant obtained a judgment after a trial dated 23 April 2010 declaring the second defendant as the beneficial owner of the properties. The two judgments are pending appeal to the Court of Appeal.

[25] By virtue of the background facts and circumstances in this case, wherein there are two SPAs over the same properties, two suits concerning the ownership of the same properties and two conflicting judgments regarding the ownership of the same properties, I find on the evidence produced in support of the plaintiff's claim discloses a serious question to be tried ie the claim is neither frivolous nor vexatious. Further, the second defendant has a caveat on the properties and the plaintiff has obtained a stay of execution against the order for possession in the second suit and there are six interlocutory appeals pending in the Court of Appeal.

[26] I am mindful that a caveat is not final and 'it is in essence a temporary equitable remedy, just like an interim injunction, provided to maintain the status quo of the parties' (per Abdull Hamid Embong FCJ in *Upmarket Development Sdn Bhd* at p 692 para 34 (MLJ); p 148 para 23 (CLJ)). Thus on the question of the balance of convenience factor, having regard to the background facts and circumstances in this case, I am of the considered opinion that the balance of convenience lies in the favour of the caveat remaining on the register pending the disposal of the appeals in the two suits.

[27] For the reasons given, the second defendant's application (encl 117) is dismissed with costs fixed at RM5,000. **A**

Second defendant's application dismissed with costs fixed at RM5,000.

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Reported by Kanesh Sundrum

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